RENDERED: MAY 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001214-MR

DONALD McPEAK — APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 01-CR-00058

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: During the late evening of March 31, 2000, someone drove Donald McPeak's Chevy Blazer into the ditch in front of his house. An Allen County jury found that McPeak had been the driver and that he had been intoxicated at the time. Because this was McPeak's fourth conviction within a five-year period of driving under the influence (DUI),[1] the offense was punished as a class-D felony. By judgment entered May 28, 2002, the Allen Circuit Court sentenced McPeak to three years in

[1] KRS 189A.010.

prison. McPeak contends that the trial court should have directed a verdict in his favor and should not have permitted the Commonwealth to introduce evidence of an aborted blood test. We are convinced that any error was harmless and so affirm the trial court's judgment.

At McPeak's trial, evidence that he had driven the Blazer into the ditch came from his neighbor Clara Johnson. She testified that at approximately eleven that night a loud crash had drawn her to her porch from where, under two yard lights, she had seen a "bronco-like" vehicle stranded in the ditch that parallels the road between her home and McPeak's. She had immediately reported the accident and then returned to her porch. Moments later she had observed a man emerge from the driver's side of the vehicle, walk across McPeak's yard, and enter McPeak's home. Although she could not see the man well enough to identify him, she testified that she was positive the person she had seen was a man.

McPeak testified that a friend, Sharon Hogue, had been driving him home that night when the vehicle had apparently hit a soft spot along the edge of the road and had slid into the ditch. Hogue had gone immediately to McPeak's house, he claimed, but he had remained near the vehicle for a few minutes to check for a gasoline leak. Having satisfied himself that

there was no leak, he had then walked across his yard and into the house.

Johnson testified, however, that Hogue had arrived at McPeak's house, in her own car, several minutes after the male figure had emerged from the wreck and gone inside. Although Johnson could not identify the man she saw emerge from McPeak's vehicle and enter McPeak's house, we agree with the trial court that her testimony permitted a rational juror to infer, beyond a reasonable doubt, that the man was McPeak and that he had driven the Blazer into the ditch.

Evidence that McPeak had been intoxicated came from the two deputy sheriffs who responded to Johnson's 911 call. The first deputy arrived within about fifteen minutes of the accident, the second about fifteen minutes later. Both officers testified that McPeak had smelled of alcohol, had had bloodshot eyes, and had had difficulty speaking and walking. Both had believed that McPeak was intoxicated. Although McPeak denied having had any alcohol to drink that night and though Hogue and another friend corroborated that denial, the officers' testimony permitted a rational juror to infer, beyond a reasonable doubt, that McPeak had been under the influence of alcohol at the time he drove the Blazer into the ditch. The trial court did not

err, therefore, when it denied McPeak's motions for a directed verdict.[2]

Following McPeak's arrest, the officers took him to the Scottsville Medical Center so that blood might be drawn for a blood test. At the center, McPeak initially consented to the blood test and signed a police form to that effect. He refused to sign a hospital form, however, that provided, among other things, that he acknowledged responsibility to pay for having his blood drawn and for any other services the medical center might provide. Because he refused to sign the acknowledgement, the medical center refused to draw his blood.

Prior to trial, McPeak moved to exclude any evidence of this curtailed blood test. He conceded that ordinarily evidence of a DUI suspect's refusal to submit to a blood test is admissible,[3] but claimed that here it was not the blood test he had refused, but the responsibility to pay for it. It would be unfair under these circumstances, he contended, to permit the Commonwealth to argue that his refusal indicated his consciousness of guilt.

Finding that McPeak's refusal to sign the hospital's form constituted a refusal of the blood test for the purposes of

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[2] Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

[3] Commonwealth v. Hager, Ky., 702 S.W.2d 431 (1986).

the implied consent statute,[4] the trial court denied McPeak's suppression motion. At trial the court permitted the Commonwealth to introduce related evidence and to argue that a sober person would not willingly forgo a test that would establish his innocence. McPeak contends that the trial court erred and that the Commonwealth's use of the forgone-blood-test evidence tainted his trial.

We agree with McPeak that the trial court erred. Under the Implied Consent Statute, KRS 189A.103, a vehicle operator in this State "consent[s] to one (1) or more tests of his blood, breath, and urine . . . if an officer has reasonable grounds to believe that a [DUI] violation has occurred." The vehicle operator does not, however, consent to pay for the test. The statute does not purport to require payment for police-initiated tests, and of course courts must refrain from reading into statutes any but the most necessary implications.[5] It is doubtful, moreover, that the state could lawfully require a DUI suspect to be financially responsible for the police-initiated tests. One suspected of a crime enjoys our law's presumption of

[4] KRS 189A.103.

[5] Beckham v. Board of Education of Jefferson County, Ky., 873 S.W. 2d 575 (1994).

innocence.[6] It is the Commonwealth's burden to marshal evidence of guilt by its own efforts and at its own expense.[7] To be sure, those convicted of crimes may be required to repay some of what they have cost the Commonwealth,[8] but before conviction the burden of proof is in no sense to be shifted to the accused. McPeak was thus under no obligation to agree to pay for the Commonwealth's investigation, and his refusal to do so should not have been equated with a refusal to submit to a blood test.[9]

Evidence of McPeak's canceled blood test was thus not admissible as evidence that he had refused the test. Was it admissible on other grounds or should it have been excluded, as McPeak claims? The trial court did not address this question.

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[6] Francis v. Franklin, 471 U.S. 307, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985).

[7] *Cf.* Commonwealth v. Stahl, 237 Ky. 388, 35 S.W.2d 563 (1931) ("The presumption of innocence goes with the defendant at all times, and for all purposes after he is charged the same as before.").

[8] *Cf.* KRS 189A.050(1) All persons convicted of violation of KRS 189.010 shall be sentenced to pay a service fee of two hundred dollars ($200), which shall be in addition to all other penalties authorized by law.

[9] *Cf.* Transportation Cabinet v. Driver, Ky. App., 828 S.W.2d 666 (1992) (DUI suspect's refusal to sign form releasing hospital from civil liability not to be equated with refusal to submit to blood test); Sparling v. Director of Revenue, 52 S.W.3d 11 (Mo. App. 2001) (DUI suspect's refusal to pay for blood test not a refusal of the test); Wilt v. Commonwealth, 711 A.2d 590 (Pa. Commv. 1998) (DUI suspect's refusal to pay for blood test not a refusal of the test).

Arguably, whatever probative value McPeak's refusal to sign the hospital's form may have had on the question of his intoxication, that value was outweighed by the unfair, but not unlikely, possibility that the jury would construe his consciousness of expense as a consciousness of guilt.[10] We need not decide this question, however, for even if the blood-test evidence should not have been admitted, its admission was a harmless error.[11]

As noted above, the Commonwealth's case rested on the testimonies of Clara Johnson and the two Deputies. The blood-test evidence was simply an addendum. At most, the blood-test evidence may be thought relevant to the credibility contest between the Commonwealth's witnesses and McPeak's witnesses, but even on that question, this evidence was tangential and cumulative. Much more important was evidence of prior statements by McPeak and Hogue inconsistent with their trial testimony, inconsistencies in their versions of when they had been riding together, and their obvious motive for fabrication. There is no reasonable likelihood that the result of McPeak's trial would have been different had the blood-test evidence been excluded. Accordingly, we must affirm the May 28, 2002, judgment of the Allen Circuit Court.

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[10] KRE 403.

[11] RCr 9.24.

HUDDLESTON, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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